Supreme Court, U.S.
FILED
OCT 20 1995
OFFICE OF THE CLERK

No. 95-87

In The

Supreme Court of the United States

October Term, 1995

J. MICHAEL MURPHY,

Petitioner,

vs.

DIVERSIFIED PRODUCTS CORPORATION, INC. and STEPHEN J. O'BRIEN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

WILLIAM A. CLINEBURG, JR.
Counsel of Record
KING & SPALDING
Attorneys for Respondents
191 Peachtree Street
Atlanta, Georgia 30303-1763
(404) 572-4600

7623
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED FOR REVIEW

I. Whether this Court should issue a writ of certiorari to review issues that were neither raised nor ruled upon in the Eleventh Circuit?

II. Whether ERISA preempts a state law misrepresentation claim that relates to a specific benefit of an ERISA plan even though the benefit itself may not constitute a plan under ERISA if administered separately?

III. Whether there is a conflict among the circuits on whether ERISA preempts Petitioner's state law claim that his employer defrauded him into accepting one ERISA plan rather than another?

PARTIES TO PROCEEDINGS BELOW

The Parties to the proceedings below are set forth in the caption of this case.

The following are parent companies and nonwholly owned subsidiaries:

Tube Mill, Inc. (formerly Diversified Products Corp.)

Westinghouse Electric Corp. (as successor by merger to Westinghouse Credit Corp.) - Owner of Tube Mill, Inc.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties to the Proceedings Below	ii
Table of Contents	iii
Table of Citations	iii
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Counterstatement of the Case	1
Reasons for Denying the Writ	4
Conclusion	16

TABLE OF CITATIONS

Cases Cited:

Boise Cascade Corp. v. Peterson, 939 F.2d 632 (8th Cir. 1991), *cert. denied*, 505 U.S. 1213 (1992) 9

Cefalu v. B.F. Goodrich Co., 871 F.2d 1290 (5th Cir. 1989) 13

Contents

Page

Fontenot v. NL Indus., 953 F.2d 960 (5th Cir. 1992) 9, 10

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) ..5, 7, 8, 9,

Fugarino v. Hartford Life & Accident Ins. Co., 969 F.2d 178 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1401 (1993) 15

Greany v. Western Farm Bureau Life Ins. Co., 973 F.2d 812 (9th Cir. 1992) 8, 9

Harris v. Provident Life & Accident Ins. Co., 26 F.3d 930 (9th Cir. 1993) 14, 15

Howard v. Gleason Corp., 901 F.2d 1154 (2d Cir. 1990) .. 9

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990) 6, 7, 10, 11, 12, 13, 14, 15

James v. Fleet/Norstar Financial Group, 992 F.2d 463 (2d Cir. 1993) 10

Kulinski v. Medtronic Bio-Medicus, Inc., 21 F.3d 254 (8th Cir. 1994) 9

Lebron v. National R.R. Passenger Corp., 115 S. Ct. 961 (1995) 5

Memorial Hosp. Sys. v. Northbrook Life Ins. Co., 904 F.2d 236 (5th Cir. 1990) 15

Contents

	Page
Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) ..	15
New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 115 S. Ct. 1671 (1995)	14
Office of Personnel Management v. Richmond, 496 U.S. 414 (1990)	5
Pohl v. National Benefits Consultants, Inc., 956 F.2d 126 (7th Cir. 1992)	13
Sanson v. General Motors Corp., 966 F.2d 618 (11th Cir. 1993), *cert. denied*, 113 S. Ct. 1578 (1993)	6
Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983)	8
Sherrod v. GMC, 33 F.3d 636 (6th Cir. 1994)	9
Smith v. Dunham-Bush, Inc., 959 F.2d 6 (2d Cir. 1992) ...	13
United States v. Williams, 504 U.S. 36 (1992)	5
Vartanian v. Monsanto Co., 14 F.3d 697 (1st Cir. 1994) ..	13
Weaver v. Employers Underwriters, Inc., 13 F.3d 172 (5th Cir. 1994), *cert. denied*, 114 S. Ct. 2137 (1994)	15, 16
Yee v. City of Escondido, 503 U.S. 519 (1992)	5

Contents

Page

Statutes Cited:

28 U.S.C. § 1254(1) 1

29 U.S.C. § 514(a) 11, 12, 14, 16

29 U.S.C. § 1003(b)(3) 8

29 U.S.C. § 1132 16

29 U.S.C. § 1144(a) 11

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is unreported and is set forth in the Appendix to the petition at pages 1a to 2a. The opinion of the United States District Court for the Middle District of Alabama is unreported and is set forth in the Appendix to the petition at pages 3a to 23a.

STATEMENT OF JURISDICTION

This Court has jurisdiction of the petition pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of ERISA involved in this case are set forth accurately in the petition at 2.

COUNTERSTATEMENT OF THE CASE

Petitioner originally brought this action against Respondents, his former employer, Diversified Products ("Diversified"), and its President, Steve O'Brien ("O'Brien"), to gain the benefits of a special employee benefit plan that he had been offered while an employee but never accepted. Petitioner alleges that he retired and accepted another employee benefit plan only because O'Brien misrepresented to him that the first plan was invalid and unenforceable.

In January 1992, Diversified's Board of Directors authorized Diversified to enter into Employment Agreements with O'Brien and each of Diversified's four vice-presidents, including Petitioner. Each Employment Agreement included a number of benefit provisions, including Paragraph 9(c), which provided severance benefits in the event Diversified terminated the

employee for "any reasons other than death, disability or Cause," and Paragraph 9(d), which provided a "golden parachute" if an employee was terminated following a sale of Diversified. (*See* App. 29a-30a.)

When Diversified offered the Employment Agreements to each vice-president in February 1992, Petitioner was the only one who did not accept, requesting instead an opportunity to meet with O'Brien to discuss questions he had. Although they did meet several times throughout the year, Petitioner never accepted or signed the Employment Agreement.

O'Brien, who had only been president since September 1991, grew increasingly dissatisfied with Petitioner's performance. In May 1992, Diversified conducted an employee satisfaction poll that ranked Petitioner's department near the bottom in many critical areas. Prior to Petitioner's scheduled performance review in August, O'Brien warned Petitioner by memo that they needed to assess "whether or not you are the best person to lead the [Human Resources] function or whether it's best for you to make a career move now or in the near future." (App. 15a.) Following his evaluation, Petitioner requested by memo that "[i]f my professional relationship with you and DP is to be concluded, then I would expect both of us to also handle such with the highest degree of professionalism, mutual respect and integrity for you and DP, as well as me and my family." (App. 16a.) Shortly thereafter, O'Brien decided to terminate Petitioner.

Although Petitioner was not eligible for Diversified's retirement benefits, Diversified agreed to allow Petitioner to retire, and O'Brien and Petitioner began meeting to negotiate a reasonable retirement package. After Diversified agreed to most of Petitioner's demands, the parties executed the Retirement Agreement, which included provisions for continuing Petitioner's salary for one year and extending group health

benefits and life insurance. Petitioner stopped working in October 1992 and retired effective December 31, 1992. Diversified continues to administer and provide benefits to Petitioner under the Retirement Agreement.

In May 1993, following the announcement of Diversified's sale, Petitioner filed this action in Alabama state court to enforce the Employment Agreement he concedes neither party ever signed. His complaint included four counts of fraud and misrepresentation. Petitioner claims that when he and O'Brien met to negotiate the terms of his Retirement Agreement in September 1992, Petitioner asked about the Employment Agreement and was told the Employment Agreements were not enforceable, Diversified would not honor the Employment Agreements, and Diversified was not contemplating the sale of the company. Petitioner also alleges that had O'Brien not misled him, he would not have retired or accepted the Retirement Agreement. (O'Brien denies having made these statements.)

According to Petitioner he discovered O'Brien's alleged misrepresentations after his retirement, when a former member of Diversified's Board of Directors told him, in March 1993, that the Employment Agreements were enforceable, Diversified intended to honor them, and Diversified had been negotiating a sale of the company while Petitioner was arranging for his retirement. (O'Brien asserts that he first learned about the possibility of a sale in early 1993.) Diversified was sold in June 1993.

When Respondents removed this action to federal court, Petitioner moved to remand. Following a hearing, the district court denied Petitioner's motion, finding that both the Employment Agreement and Retirement Agreement were employee benefit plans and ERISA preempted Petitioner's state law misrepresentation claims because the claims related to the

two plans. (Order, August 6, 1993, p. 5; *see* App. 8a.) After the parties completed discovery, Respondents moved for summary judgment. Following another hearing, the district court granted Respondents' motion, finding that Petitioner was not a participant or beneficiary of the Employment Agreement because he never signed it, he was receiving all his benefits under the Retirement Agreement, and ERISA preempted his state law misrepresentation claims. (App. 13a-14a, 17a.) The district court also found that Petitioner's decision to retire could not have been affected by the alleged misrepresentations because he "would have been terminated had he not retired." (App. 15a-16a.)

On appeal to the Eleventh Circuit, Petitioner did not challenge the district court's findings that the Employment Agreement and Retirement Agreement were employee benefit plans and that Diversified would have terminated Petitioner had he not retired. Instead, he argued that ERISA does not preempt state law claims relating to employee benefit plans in which the employer pays benefits directly and in which only a small number of employees participate. In a brief per curiam decision, the Eleventh Circuit affirmed, finding Petitioner's claims related directly to the Employment and Retirement Agreements and were therefore preempted, and Petitioner was not a participant or beneficiary of the Employment Agreement because he never signed it. (App. 2a.)

REASONS FOR DENYING THE WRIT

Petitioner argued below that the Employment Agreement is not an employee benefit plan and ERISA should not preempt claims relating to certain kinds of employee benefit plans. Petitioner now abandons these arguments and argues for the first time that his claims seeking the benefit of the golden parachute do not relate to an ERISA plan because they only relate to Paragraph 9(d) of the Employment Agreement and ERISA should not preempt claims brought by nonparticipants.

This Court should not grant a writ of certiorari because it has been the practice of this Court not to do so when a petitioner raises arguments for the first time in a petition to this Court. Furthermore, the challenged ruling that ERISA preempts state law claims even though they relate to only one benefit of an employee benefit plan is consistent with this Court's decision in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), and the decisions of other Courts of Appeals. Likewise, there is no conflict among the Courts of Appeals on the principle that ERISA preempts state law claims that relate to an employee benefit plan whether or not the plaintiff is a participant in the plan.

I.

This Court's traditional rule has been to deny certiorari when "the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal quotations omitted). Although it is within this Court's power and discretion to hear and decide questions of law that were not raised on appeal or addressed by the lower courts, *see Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995); *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992), it has been the practice of this Court not to grant a petition for a writ of certiorari under such circumstances. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 440-41 (1990) (Marshall, J., dissenting).

This case is a clear example of one in which the court should deny certiorari because a litigant has failed to raise or preserve arguments in the courts below. As the only grounds for his petition, Petitioner raises two arguments that he neither presented in the district court nor raised in the Court of Appeals.

In his complaint, Petitioner alleged that he had been defrauded out of accepting the Employment Agreement. In

opposing removal, Petitioner unsuccessfully argued that the Employment Agreement was not an employee benefit plan covered by ERISA. At the completion of discovery, Respondents moved for summary judgment relying primarily on *Sanson v. General Motors Corp.*, 966 F.2d 618 (11th Cir. 1993), *cert. denied*, 113 S. Ct. 1578 (1993), a decision in which the Eleventh Circuit applied *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990), and found preemption on nearly identical facts. In his opposition, Petitioner did not dispute that his claims related to the Employment Agreement or that the Employment Agreement was an ERISA plan. The only arguments Petitioner made were to attempt to distinguish *Sanson* and complain that he would be left without a remedy. The district court granted summary judgment, reiterating its conclusion that Petitioner's "fraud claims relate to an ERISA-governed employee benefit plan and therefore are preempted." (App. 8a.)

On appeal to the Eleventh Circuit, Petitioner again did not challenge the district court's conclusion that his claims related to an ERISA plan. Nor did Petitioner object to the district court's finding that he would have been terminated if he had not retired. Other than raising nonmaterial questions of fact, Petitioner's only argument was that *Sanson* did not or should not apply to an employee benefit plan like the Employment Agreement.

The one page decision of the Eleventh Circuit is a stark testament to Petitioner's failure to raise in that court any of the issues he presses in this petition. The Eleventh Circuit noted at the outset that "the district court concluded, *and the appellant properly concedes*, the Employment Agreement and Retirement Agreement[1] at issue herein are covered by ERISA." (App. 2a.) Based on this concession, the Court of Appeals summarily

1. Petitioner concedes that the Retirement Agreement is an employee benefit plan. Petitioner's brief at 9 n.5.

affirmed, concluding that ERISA preempted Petitioner's claims because they were directly related to two employee benefit plans. (*Id.*)

Petitioner now argues, first, that his claims are not to enforce the Employment Agreement, but to enforce only Paragraph 9(d), which, he argues, is not by itself an employee benefit plan[2]; and, second, that *McClendon* should not bar state law claims brought by nonparticipants of a plan. This Court should deny the petition because neither argument was advocated, considered, or decided below. Nevertheless, as discussed further below, the decisions of the district court and the Eleventh Circuit are also consistent with decisions of this Court and other Courts of Appeals.

II.

Petitioner's new argument that ERISA does not preempt his state law claims because they relate solely to Paragraph 9(d), rather than to the Employment Agreement as a whole, reveals a fundamental misunderstanding of the preemptive scope of ERISA and the decision of this Court in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). In *Fort Halifax*, this Court distinguished between "employee benefits" and "employee benefit plans", and held that Congress intended that ERISA only preempt state laws relating to the latter. *Id.* at 7-8. The case involved a Maine statute that required employers to provide a one-time lump sum severance payment in the event of a plant closing. The Court recognized that Congress designed ERISA's preemption clause to protect employers from additional or conflicting state regulation regarding the administration of a plan. *Id.* at 9. The Court concluded that ERISA did not preempt the statute because it "neither establishes, nor requires an

---

2. The district court disagreed, suggesting that Paragraph 9(d) might also require an administrative scheme. (Order, August 6, 1993, pp. 4-5.)

employer to maintain, an employee benefit plan," and because the "requirement of a one-time, lump-sum payment triggered by a single event requires no administrative scheme whatsoever." *Id.* at 12.

The Court relied in part on an earlier decision, *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983), which is perhaps even more relevant to the facts in this case. In *Shaw*, the Court held that "only disability programs administered *separately from other benefit plans* fall within ERISA's preemption exemption for plans maintained 'for the purpose of complying with . . . disability insurance laws." *Fort Halifax*, 482 U.S. at 10 (*quoting* 29 U.S.C. § 1003(b)(3)) (emphasis added).

The rule that emerges from *Fort Halifax* and *Shaw* is that a court may not "pierce the veil", so to speak, and look within an employee benefit plan to determine whether each provision of the plan requires an administrative scheme. If an employer establishes a "plan", like each of Diversified's five Employment Agreements, ERISA insulates the plan from state regulation. Here, whether Paragraph 9(d) requires administration is irrelevant because, as the district court concluded, the remaining provisions of the Employment Agreement necessarily require an administrative scheme. Petitioner ignores the self-evident fact that every regulation of a benefit is a regulation of the plan of which the benefit is a part. Whether an individual benefit requires administration is irrelevant if the plan requires administration.

Relying on *Fort Halifax*, Courts of Appeals have consistently held that state laws are preempted if they relate to a benefit that is part of a plan. In *Greany v. Western Farm Bureau Life Ins. Co.*, 973 F.2d 812 (9th Cir. 1992), plaintiff argued that his state law claim to recover benefits under a special "conversion policy" available to participants in his employer's comprehensive employee benefit plan were not preempted

because "the conversion policy and the facts surrounding its processing are merely an employee benefit that is free from ERISA's broad reach." *Id.* at 817. The Ninth Circuit disagreed: "The opportunity to convert the group plan to an individual policy is a benefit provided pursuant to the group plan. . . . No conversion benefits would be available unless the party seeking the conversion policy was an eligible insured beneficiary of a group plan." *Id. See also Boise Cascade Corp. v. Peterson*, 939 F.2d 632 (8th Cir. 1991) (ERISA preempts state law that regulates a term of apprenticeship programs that the state conceded were employee benefit plans), *cert. denied*, 505 U.S. 1213 (1992); *Howard v. Gleason Corp.*, 901 F.2d 1154 (2d Cir. 1990) (ERISA preempts state law claims that employer failed to notify plaintiff of right to convert medical insurance because conversion right was one benefit of welfare benefit plan).

Although Petitioner argues there is a split among the Circuits, in fact each of the four decisions upon which he relies is consistent with *Fort Halifax* and the decisions of the other Courts of Appeals. In *Kulinski v. Medtronic Bio-Medicus, Inc.*, 21 F.3d 254 (8th Cir. 1994), the Eighth Circuit held that ERISA did not preempt a state law claim to enforce a "change-of-control-termination agreement ("CCTA")" or "golden parachute" because "the CCTA was entirely self-contained" and its *only* provision was for the severance payment. *Id.* at 255, 258. In *Sherrod v. GMC*, 33 F.3d 636 (6th Cir. 1994), the Sixth Circuit held that ERISA did not preempt a state law claim to recover under a General Motors plan because the plan's *singular* provision was to pay a lump-sum benefit if an employee voluntarily left GM and relinquished his seniority rights. *Id.* at 638-39. In *Fontenot v. NL Indus.*, 953 F.2d 960 (5th Cir. 1992), the Fifth Circuit held that ERISA did not preempt a state law cause of action to enforce an employer's Senior Executive Severance Plan because the plan's *only* provision was to provide a one-time lump sum severance payment in the event an officer

was terminated within three years of a change of control. *Id.* at 962. Finally, in *James v. Fleet/Norstar Financial Group*, 992 F.2d 463 (2d Cir. 1993), the Second Circuit held that ERISA did not preempt a state law claim to fulfil an employer's promise to give employees who remained through a consolidation a one-time payment of sixty days wages. *Id.* at 463.

In each of these cases, the Court relied on the complete absence of a plan in determining that ERISA did not preempt. Each of these cases stands for the same proposition: although ERISA preempts laws relating to plans and laws relating to benefits that are provided as part of a plan, ERISA does not preempt laws relating to a benefit that is not provided as part of a plan and does not require an administrative scheme.

Petitioner's attempt to avoid preemption by recharacterizing his claim in this Court as one to enforce Paragraph 9(d) alone is fruitless. Paragraph 9(d) is an integral part of the Employment Agreement, which Petitioner concedes is an employee benefit plan; any claim to enforce that provision necessarily relates to an employee benefit plan.

III.

Notwithstanding Petitioner's characterization, the Eleventh Circuit's decision that ERISA preempted his claims was a straightforward application of the rule and reasoning of this Court in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990), and of other Courts of Appeals. The exception that Petitioner would have this Court adopt allowing state law claims related to ERISA plans by nonparticipants and nonbeneficiaries would undermine and frustrate Congressional intent that employee benefit plans be insulated against state law regulation.

In *McClendon*, plaintiff alleged that his employer had

terminated him to prevent his benefits from vesting. The Texas Supreme Court held that ERISA did not preempt plaintiff's wrongful termination claim because he sought damages (lost wages and compensation) that were unrelated to the plan. *Id.* at 136. This Court reversed, finding that Congress had expressly preempted common law causes of action when "the existence of a pension plan is a critical factor in establishing liability" and when "there simply is no cause of action if there is no plan." *Id.* at 139-40.

The Court began with § 514(a) of ERISA, which expressly preempts

> any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

Id. at 138 (*quoting* 29 U.S.C. § 1144(a)).

Noting that § 514(a) is "conspicuous for its breadth," and that its "deliberately expansive" language was "designed to 'establish pension plan regulation as exclusively a federal concern,' " the Court summarized its earlier decisions concerning when a law relates to a plan:

> "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." Under this "broad common-sense meaning," a state law may "relate to" a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect. Pre-emption is also

> not precluded simply because a state law is consistent with ERISA's substantive requirements.

Id. at 138-39 (citations omitted).

The Court had "no difficulty in concluding" that McClendon's cause of action "'relates to' an ERISA-covered plan within the meaning of § 514(a), and is therefore pre-empted." *Id.* at 140. Although McClendon argued that only the plan's existence mattered and not its details, the Court dismissed this argument as "miss[ing] the point, which is that under the Texas court's analysis there simply is no cause of action if there is no plan." *Id.*

Petitioner's cause of action for fraud is no less "related to" an ERISA plan than was McClendon's. Petitioner's own complaint recognizes that to prevail he must prove that an employee benefit plan exists, he was eligible for the plan, he would have received benefits under the plan, and Respondents made a material misrepresentation about the existence and enforceability of the plan.[3]

Petitioner cannot argue that his case is simply a cause of action for fraud, just as McClendon could not argue that his was simply a cause of action for wrongful discharge. In both cases, whether plaintiff will recover necessarily turns on the existence of an employee benefit plan. And, just as the Court's decision in *McClendon* did not eliminate all state law claims for wrongful

---

3. In fact, Petitioner's claim for fraud is even more closely related to an ERISA plan than was McClendon's in that to calculate damages, Petitioner will have to reference a second ERISA plan, the Retirement Agreement, as Petitioner's damages would necessarily have to be reduced by the value of benefits he has already received under the Retirement Agreement.

discharge, the decision of the Eleventh Circuit below will not eliminate all state law claims for fraud. The decisions simply preempt causes of action that require, as an element of their case, that plaintiff prove the existence of an ERISA plan.

A number of decisions demonstrate that the Courts of Appeals are interpreting and applying *McClendon* consistently with the decisions below in this case. In *Smith v. Dunham-Bush, Inc.*, 959 F.2d 6 (2d Cir. 1992), an employee claimed that he accepted a transfer in reliance on his employer's promise to supplement his benefits under a new plan; the Second Circuit held that ERISA preempted his state law claim for misrepresentation. In *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290 (5th Cir. 1989), plaintiff claimed that he retired and purchased a franchise in reliance on the employer's promise that his retirement benefits as a franchisee would be equivalent to those he would have received had he stayed with the company; the Fifth Circuit held that ERISA preempted plaintiff's state law misrepresentation claims. In *Pohl v. National Benefits Consultants, Inc.*, 956 F.2d 126 (7th Cir. 1992), plaintiff claimed that he incurred additional personal expenses in reliance on his employer's assurance that he was covered under the employer's medical plan; the Seventh Circuit held that ERISA preempted plaintiff's misrepresentation claim. *See also Vartanian v. Monsanto Co.*, 14 F.3d 697 (1st Cir. 1994) (ERISA preempts employee's fraud claim that he retired in reliance on employer's misrepresentation that no new retirement plan was being considered; court did hold that employee was a "participant" of the new plan and therefore had standing to bring a claim under ERISA).

Alternatively, Petitioner argues *McClendon* should not apply when the plaintiff is not a participant in the plan to which the state law cause of action relates. However, nothing in ERISA or the decisions of this Court suggest that ERISA preemption is predicated upon the plaintiff's status as a plan participant.

Rather, ERISA preemption is predicated on a Congressional goal of administrative uniformity. A state law that allows a nonparticipant or non-beneficiary to bring a cause of action that is related to an employee benefit plan is just as likely to disrupt plan administration as is a cause of action by a participant or beneficiary.

Since *McClendon*, this Court has reiterated that the purpose of § 514(a) is

> "to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government . . . , [and to prevent] the potential for conflict in substantive law . . . requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction."

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 115 S. Ct. 1671, 1677 (1995) (*quoting McClendon*, 498 U.S. at 142 (citation omitted)). This passage allows no room for distinguishing between claims brought by participants and claims brought by non-participants. *See also Blue Cross & Blue Shield Plans*, 115 S. Ct. at 1677-78 ("The basic thrust of the pre-emption clause . . . was to avoid a multiplicity of regulations in order to permit the nationally uniform administration of employee benefit plans.")

Petitioner contends that other Circuits have recognized a distinction in preemption cases between participants and nonparticipants, when in fact each decision is distinguishable. In *Harris v. Provident Life & Accident Ins. Co.*, 26 F.3d 930 (9th Cir.

1993), plaintiff sued to recover medical benefits after learning that, contrary to the employer's representation, he was not yet eligible. *Id.* at 931. The Court never applied *McClendon* because it found that subject matter jurisdiction was lacking. Because plaintiff could not bring a claim under ERISA as a participant or beneficiary, and because "'ERISA pre-emption, without more, does not convert a state claim into an action arising under federal law,'" the Court held that the complaint must be remanded for lack of subject matter jurisdiction. *Id.* at 933-34 (*quoting Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 64 (1987)).

In *Fugarino v. Hartford Life & Accident Ins. Co.*, 969 F.2d 178 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1401 (1993), plaintiff, an employer, purchased a health insurance policy for himself, his family, and some of his employees. He sued after the insurer refused to reimburse him for medical costs incurred for one of his children. *Id.* at 180-82. The Court held that although the insurance plan was an ERISA plan vis a vis plaintiff's employees, as to plaintiff, the insurance policy was merely an insurance contract between an employer and the insurance company and therefore state law governed. *Id.* at 186.

Finally, in *Weaver v. Employers Underwriters, Inc.*, 13 F.3d 172 (5th Cir. 1994), *cert. denied*, 114 S. Ct. 2137 (1994), the employer obtained a medical insurance policy for his employees. Although the employer referred to plaintiff as an employee and intended that he be covered, plaintiff was legally a subcontractor. When the insurance company learned that plaintiff was a subcontractor and not an employee, it stopped making payments for an injury. After the insurer settled, Plaintiff sued the employer alleging a number of claims arising out of the settlement agreement. *Id.* at 173-74. The Fifth Circuit inexplicably ignored *McClendon* and relied on a test articulated in *Memorial Hosp. Sys. v. Northbrook Life Ins. Co.*, 904 F.2d 236 (5th Cir. 1990), a decision that predated *McClendon*. The court held that plaintiff's

claims were not preempted because the "claims by a nonparticipant and nonbeneficiary to a plan do not affect the relationship between the traditional ERISA entities." *Id.* at 177. This decision is of doubtful validity.

This Court has consistently held that ERISA contains one of the broadest preemption clauses of any piece of federal legislation. Section 514(a) preempts any state law or state law cause of action that could interfere with an employer's administration of an employee benefit plan. Nothing in this Court's decisions or in ERISA itself suggests that an exception should be recognized for plaintiffs who are not participants in the plan. Petitioner cannot argue that such claims would have any less effect on plan administration.

Although Petitioner's claim challenges the scope of ERISA's preemption clause, his real complaint lies with 29 U.S.C. § 1132, ERISA's civil enforcement provision. The answer to Petitioner's appeal is not to create a significant exception to ERISA's preemption clause, but to legislate a new remedy for persons in Petitioner's position. That is a job for the United States Congress.

CONCLUSION

For the foregoing reasons, Respondents urge that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

WILLIAM A. CLINEBURG, JR.
Counsel of Record
KING & SPALDING
Attorneys for Respondents
191 Peachtree Street
Atlanta, Georgia 30303-1763
(404) 572-4600